Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
July 1, 2004 Annual Access Charge Tariff Filings	WCB/Pricing 04-18 DA 04-1049

OPPOSITION TO PETITION TO SUSPEND AND INVESTIGATE

ACS of Anchorage, Inc. ("ACS"), through its attorneys, hereby opposes the Petition of AT&T Corp. ("AT&T") to suspend and investigate ACS's above-referenced tariff filing. This transmittal complies fully with the Communications Act, the Commission's rules, and applicable court and Commission precedent, and raises no substantial question of lawfulness that would support a Commission investigation.

Specifically, contrary to the allegations of AT&T, ACS has reasonably projected its demand and costs in its 2004 access charge tariff, and is not required to tariff unreasonably low rates for the upcoming period to account for alleged over-earnings for the first year of the monitoring period. Further, ACS has properly calculated cash working capital in compliance with the Commission's rules

I. AT&T'S ARGUMENT THAT THE ACS TARIFF SHOULD BE SUSPENDED BASED ON PAST ALLEGED OVER-EARNINGS IS VAGUE AND WITHOUT MERIT

AT&T claims that ACS's interstate access tariff should be suspended because unidentified "errors" have lead to "systematic over-earnings."[1] AT&T points to no particular "systematic errors" in ACS's tariffs, past or present, on which AT&T bases its claims. Further,

[1] AT&T Petition at 5-6.

the tariff filing that AT&T seeks to suspend includes substantial rate reductions to target earnings of 11.25 percent. AT&T will be a significant beneficiary of those rate reductions. Thus, AT&T's reliance on past tariffs demonstrates nothing regarding ACS's current filing. Moreover, AT&T's Petition is impermissibly vague – it does not specify over what period of time ACS was "systematically" over-earning. AT&T's own evidence shows that ACS's rate-of-return for combined traffic sensitive and special access services is trending down.[2] Although the preliminary data reflects a slight increase for traffic sensitive rate-of-return in 2003, as discussed further below, this provides no evidence of what the final earnings report will show. As such, AT&T does not present a statistically significant set of data for the Commission to examine that would indicate any "trend" of "systematic over-earnings" is occurring.

Effectively, AT&T is requesting that ACS's tariff be suspended because AT&T would like more time than the statute provides or simply would like to avoid the tariff gaining "deemed-lawful" status altogether. AT&T's request appears merely to be an attempt to circumvent the statutory streamlined tariff filing process.[3] The Commission should not indulge AT&T's effort to circumvent Section 204(a)(3) to allow it to go on a fishing expedition regarding ACS's tariff.

II. ACS CANNOT BE REQUIRED TO TARIFF RATES THAT ARE UNJUSTLY AND UNREASONABLY LOW

AT&T's assertion that ACS must make a "mid-course adjustment" for allegedly exceeding the Commission's prescribed rate of return in 2003 is equally unavailing.[4] *First*, it

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[2] AT&T Petition at Exhibits B-11, B-12.

[3] *See ACS of Anchorage, Inc. v. F.C.C.*, 290 F.3d 403, 410-412 (D.C. Cir. 2002); Implementation Of Section 402(B)(1)(A) Of The Telecommunications Act Of 1996, CC Docket No. 96-187, 12 FCC Rcd 2170, ¶¶ 18-24 (1997) ("*Streamlined Tariff Order*").

[4] AT&T Petition at 6.

would be inappropriate for ACS, AT&T, or the Commission to adjust ACS's rates based on the information contained in ACS's preliminary Form 492 monitoring report upon which AT&T bases its claim. ACS has yet to file its final monitoring report for the 2003-2004 period, which will be due in September 2005. As the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has explained, the preliminary monitoring report is not "a reliable indicator of whether the LEC has earned more than allowed."[5] Thus, AT&T's claim for damages would not accrue with the filing of the preliminary report because "the *raison d'etre* for the final report is to afford the LEC time to adjust the data submitted in its preliminary report."[6] The Commission, also recently reiterated that the preliminary monitoring report does not contain binding representations as to a carrier's earnings.[7]

Second, the Act does not permit the Commission to require that "LECs . . . make downward adjustments to their rates for the 2004 period to bring . . . *overall returns for the 2003-2004 period* within the range of 11.25%."[8] ACS's rates in effect during 2003 were "deemed lawful" under the provisions of Section 204(a)(3) of the Act, 47 U.S.C. § 204(a)(3). As the D.C. Circuit has confirmed, the Commission's rate-of-return prescription is not an end in itself; rather it is a proxy for determining whether a carrier's underlying rates are just and reasonable.[9] Where, as here, the rates in question are deemed lawful under Section 204(a)(3), no such proxy is needed

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5 *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1417 (D.C. Cir. 1995)

6 *Id.* Indeed, the D.C. Circuit noted that, in five of the cases at issue in *MCI*, the preliminary report did not accurately indicate whether the LEC had over-earned. *Id.*

7 *General Communication, Inc. v. ACS Holdings, Inc.*, 16 FCC Rcd 2834 (2001), *aff'd in part, rev'd in part, and remanded sub nom. ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

8 AT&T Petition at 6 [emphasis added].

9 *ACS of Anchorage*, 290 F.3d at 412.

(or even relevant) because the Commission's ability to order retrospective refunds has been extinguished.[10]

While the Commission may prescribe rates going forward that are reasonably calculated to yield a carrier's authorized rate of return, it may not order a mid-course correction calculated to produce unreasonably low earnings below that level. Such action would be indistinguishable from a Commission-ordered refund, and the Commission may not circumvent Section 204(a)(3) or the D.C. Circuit's clear holdings in such a manner. Under Section 204(a)(3), "the inquiry ends"[11] with respect to the lawfulness of ACS's rates for 2003 because, as the Commission itself has recognized, the tariff "is conclusively presumed to be reasonable,"[12] regardless of the earnings the tariff produced. Thus, under Section 204(a)(3), the Commission has been stripped of the legal basis that formerly may have supported the ordering of such a mid-course correction, and the Commission may not order the "sharing" of past earnings on a going-forward basis with access customers.

Third, even in the event that the 2003 rates were not deemed lawful, ACS is not required in the 2004 filing to under-earn by an amount calculated to bring its overall earnings for the 2003-2004 monitoring period into a projection of 11.25 percent or less. As stated above, earnings are reviewed only as a proxy for the reasonableness of a carrier's rates. AT&T has offered no concrete evidence that ACS's rates are unreasonable. Therefore, the tariff may not be suspended based solely on a preliminary earnings report for one year of the two-year monitoring period. Moreover, if AT&T is to be believed, they would have ACS lower its rates in July 2004 to compensate for alleged over-earnings in prior parts of the monitoring period. Such a "make-

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[10] *Id*.

[11] *Id.*

[12] *Streamlined Tariff Order* at ¶19.

up" requirement would be completely unworkable, considering that the 2003-2004 earnings period will end in six months, but the tariff for which AT&T seeks suspension will be in effect for one or two years. Under AT&T's reasoning, ACS would have to drastically cut rates for a six-month period, such that it would then have to revise its rates in six months in order to avoid 18 more months of severe under-earnings.

In this filing, ACS *has* made a substantial adjustment to access rates, primarily because of significant reductions in its rate base.[13] These rates will produce substantial savings for AT&T. AT&T has offered no evidence that declining demand trends are likely to change in Anchorage or that ACS's cost figures are erroneous. ACS's rates under this tariff are targeted to achieve the authorized 11.25 percent earnings. Therefore, the tariff is lawful.

III. ACS PROPERLY ESTIMATED ITS CASH WORKING CAPITAL REQUIREMENT

AT&T's allegations regarding excessive cash working capital ("CWC") requirements are misleading on the facts and wrong on the law. As an initial matter, AT&T attempts to gain critical mass for its negligible claim by listing the alleged effect on interstate revenue requirements as $689,000, but this dollar figure covers 17 different operating companies.[14] Looking only at ACS, the alleged effect on its revenue requirements would be $38,830.[15] This dollar figure is *de minimis*, and thus would have no meaningful effect on ACS's ratepayers such as AT&T. Further, AT&T is incorrect in its claim that the Commission required ACS to conduct a "lead-lag study." Neither ACS nor its predecessor company, Anchorage

[13] ACS has succeeded in cutting its costs approximately in half over the past five years.

[14] AT&T Petition at Exhibit F-1.

[15] *Id*.

Telephone Utility, is even mentioned in the order cited by AT&T.[16] The Commission's rules provide alternatives for calculating CWC.[17] ACS calculates its CWC consistent with Section 65.820(d) and (e) of the Commission rules, as set forth in the NECA Cost Issue 7.2. Thus, the allegations regarding ACS's CWC should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Petition of AT&T to suspend and investigate the 2004 annual access tariff filing of ACS of Anchorage, Inc. should be denied.

Respectfully submitted,

ACS OF ANCHORAGE, INC.

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[16] AT&T Petition at 13 (citing *1997 Annual Access Tariff Filings*, 13 FCC Rcd 3815, ¶¶ 221-224 (1997)).

[17] *1997 Annual Access Tariff Filings* at ¶ 208; *see* 47 C.F.R. §§ 65.820(d)-(e).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition of ACS of Anchorage, Inc., was served this 30th day of June, 2004, upon the following:

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